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No. 87-2081

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES SPERRAZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied a speedy trial in violation of Rule 707 of the Rules for Courts-Martial and the Sixth Amendment.

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OPINIONS BELOW

The judgment order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 1a) is not yet reported. The judgment order of the Air Force Court of Military Review (Pet. App. 2a-3a) is not yet reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 22, 1988. The petition for a writ of certiorari was filed on June 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Petitioner, a member of the United States Air Force, pled guilty to the wrongful use of fentanyl, a controlled substance, in violation of Article 112a of the Uniform Code of Military Justice, 10 U.S.C. (Supp. IV) 912a. He

was sentenced to dismissal from the service and the total forfeiture of his pay and allowances. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 2a-3a). The Court of Military Appeals modified the sentence but otherwise affirmed the judgment (*id.* at 1a).

1. On April 1, 1986, petitioner, an anesthesiologist undergoing a clinical evaluation of his skills at Wilford Hall Medical Center at Lackland Air Force Base in Texas, was relieved of his duties and hospitalized in the psychiatric ward when it was discovered that he might be abusing fentanyl, a controlled substance used as a surgical anesthesia (Tr. 11, 43-45; PX 1). Petitioner was hospitalized for three reasons: (1) to evaluate him for drug addiction and withdrawal; (2) to determine whether he was suffering from any underlying psychiatric disorder; and (3) to insure against the risk that petitioner might commit suicide (Tr. 13-14, 45-46).[1] Petitioner was discharged from the ward on April 15 after Dr. Fragola, the supervising psychiatrist, determined that petitioner's release was medically indicated (Tr. 19-20, 40, 48, 84).

The following day, petitioner returned to the Wright-Patterson Air Force Base Medical Center in Ohio where he was regularly assigned. There, he was notified that his

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[1] Fentanyl is designated a controlled substance under Schedule II of the Controlled Substances Act of 1970, 21 U.S.C. 812. Petitioner's blood and urine yielded positive test results for fentanyl (Tr. 14, 78; PX 1; AX 10, at 24).

A different anesthesiologist had committed suicide under similar circumstances a year before (Tr. 16, 29-30). Petitioner was placed in "Category 1" status, which was the standard practice. Patients in that status are kept under close supervision because of the risk of suicide, and they are prevented from leaving the ward without an escort (Tr. 12, 73).

privileges to practice medicine in the hospital were indefinitely suspended pending an investigation into his professional competence (Tr. 114; AX 12).[2] In all other respects, petitioner was under no restraint, and no criminal proceedings of any kind were pending against petitioner until charges were preferred on July 24, 1986 (AXs 3, 30).

2. Before trial, petitioner moved to dismiss the charges under Rule 707 of the Rules for Courts-Martial. Rule 707, which is patterned after the Speedy Trial Act of 1974, 18 U.S.C. (& Supp. IV) 3161 *et seq.*, requires that a military defendant be tried within 120 days after notice of the preferral of charges or after the imposition of pretrial restraint, whichever occurs first. Rule 707(a), (b)(1) and (2), *Manual for Courts-Martial, United States—1984 (Manual)*. Petitioner argued that, beginning on April 10, 1986, his hospitalization was a pretext for confining him pending a court-martial. The speedy trial period established by Rule 707 therefore began to run on April 10, petitioner claimed, and because he was not brought to trial within 120 days of that date, the charges should be dismissed (Tr. 8, 131-134; AX 1).

The trial judge denied the motion. The judge found that petitioner was both hospitalized and released for valid

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[2] The suspension was authorized by Air Force Regulation 168-13, *Quality Assurance in the Air Force Medical Service*, para. 8-9 (May 31, 1984), which authorizes the chairperson of the hospital credentials committee summarily to suspend the privileges of any practitioner whose conduct is "reasonably probable of being detrimental to the patient's safety or to the proper delivery of quality patient care." Although petitioner's suspension was based at least in part on his reported drug abuse, the suspension was not related to petitioner's subsequent court-martial proceedings.

medical reasons (Tr. 135-136).[3] The judge then held that the 120-day speedy trial period required by the Rule did not commence until July 24, when charges were brought against petitioner (Tr. 135-137). In addition, the court held that, even if petitioner's hospitalization was tantamount to pretrial confinement, petitioner's release suspended the running of the clock under Rule for Courts-Martial 707(b)(2). After deducting periods of delay attributable to the defense,[4] the court held that petitioner was brought to trial within the period required by the Rule (Tr. 137).

ARGUMENT

Petitioner's fact-bound claim that his speedy trial rights were denied does not merit review. His claim finds no support in military law or in the Sixth Amendment.

1. Petitioner's hospitalization in April 1986 did not trigger his right to a speedy trial under Rule 707 because his hospitalization was unrelated to any prospective court-martial. Unlike civilians, every servicemember, including those who are suspects in a criminal investigation, experiences restrictions on his freedom due to his status as a member of the armed forces. Not every such restraint,

[3] The trial judge specifically rejected petitioner's claim that he was released because he had filed a complaint seeking release from hospitalization. As the trial judge stated, "[t]he decision to release [petitioner] was medical and not legal and the decision was not dependent upon or the result of the grievance filed by [petitioner]." Tr. 136.

[4] Delays attributable to the defense are excluded from the 120-day period. Rule 707(c)(3), *Manual*. The bulk of that delay (the seven months from November 5, 1986, until trial began on June 2, 1987) was attributable to petitioner's request that his trial be indefinitely postponed pending action on his application to resign from the Air Force in lieu of a court-martial (AX 8). Petitioner does not dispute that he is responsible for that period of time.

however, triggers a defendant's right to a speedy trial under the Rules for Courts-Martial. The test for determining whether a particular restriction starts the military speedy trial clock focuses on its primary purpose. When the primary purpose of a particular restriction is to assure that the serviceman is present for trial or is to avoid interference with the trial process, the 120-day period set by Rule 707 commences with the restraint. *United States* v. *Bradford*, 25 M.J. 181, 186 (C.M.A. 1987).

Petitioner's hospitalization does not satisfy that test. Petitioner was not confined pending a court-martial. Rather, he was hospitalized in order to determine whether he was suffering from a drug addiction or a psychiatric disorder, and if he was, to enable him to receive appropriate medical treatment. Neither purpose satisfies the test endorsed by the Court of Military Appeals in *United States* v. *Bradford, supra.*

Petitioner does not contend that his hospitalization from April 1 through 9, 1986, triggered his speedy trial rights under the Rule. Rather, petitioner contends (Pet. 4-5) that his hospitalization was transformed into a pretrial restraint on April 10, because there was no valid medical reason to continue his hospitalization on that date. Moreover, petitioner argues, the period of pretrial restraint that began on April 10 continued until the day of his trial, because he was suspended from the practice of medicine. Those arguments lack merit.

Even if the few days of petitioner's hospitalization from April 10-15 amounted to a sufficient restraint to trigger the requirements of Rule 707, petitioner was released from the hospital on April 15, and he thereafter suffered no restraints on his liberty until July 24, when the charges were preferred against him. Under Rule 707(b)(2) of the Rules for Courts-Martial, once a servicemember is released from a pretrial restraint for a "significant period"

when no charges are pending, the speedy trial clock begins to run only from the date on which a charge or restraint is reinstituted. Rule 707(b)(2), *Manual*. The 101-day period between April 15 and July 24 amounted to a "significant period." See *United States* v. *Gray*, 26 M.J. 16, 20 (C.M.A. 1988) (opinion of Sullivan, J.) (34 days is a "significant period"); *id.* at 22 (Everett, C.J., concurring in the result) (same). The speedy trial clock therefore began to run only when charges were preferred against petitioner on July 24.

Moreover, the suspension of petitioner's medical privileges following his release from hospitalization was not equivalent to pretrial detention or a lesser restriction, such as release on bail or personal recognizance. Unlike pretrial detention or conditional release pending trial, the suspension of petitioner's medical privileges was an administrative measure required by Air Force regulations and sound medical practice and was unrelated to any pending or anticipated criminal proceedings. See page 3 note 2, *supra*.

2. Petitioner refers to the Sixth Amendment Speedy Trial Clause in the questions presented and in his conclusion, but he does not discuss the Sixth Amendment in the body of his petition. In any event, petitioner's claim fares no better under the Sixth Amendment than under the Rules for Courts-Martial.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court adopted a four-factor balancing test to determine whether a defendant's speedy trial right had been denied. The factors are the length of delay, the reason for delay, the accused's demand for a speedy trial, and any prejudice suffered by the accused. *Id.* at 530-533. In this case, even granting petitioner his starting date of April 10, 1986, the total delay until trial began in June 1987 was only 14 months. The defense was itself directly responsible for 8 of

those 14 months, for example, because it requested a postponement of trial in order to learn whether petitioner would be allowed to resign from the Air Force (AXs 3, 8, 30). The government was responsible for no more than six months of delay, which is not presumptively prejudicial. Petitioner has also failed to explain how his ability to marshal a defense was hampered. Finally, petitioner clearly did not want a speedy trial, as shown by his requests to postpone the trial. Under these circumstances, petitioner's Sixth Amendment speedy trial right was not violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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